Sing Kee Motor Credit Sdn Bhd v Public Finance Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO N-02-466 OF 1996
SHAIK DAUD, DENIS ONG AND HAIDAR JJCA
29 SEPTEMBER 2000

***Contract** — Termination — Validity — Agreement to provide credit facilities to second hand car dealer — Failure to remit payment to finance company on time — Whether time of the essence — Whether defendant estopped from denying validity of termination*

The appellant ('SK') was involved in second hand car business and provided credit facilities. The respondent ('PFB'), a finance company, provided credit facilities to SK in its business. The parties executed an agreement which, inter alia, imposed the obligation on SK to collect and pay on behalf of hirers and to remit the payments to PFB punctually on specified dates. PFB claimed that SK had failed to remit the payments punctually. PFB then issued a letter dated 25 July 1985 to SK terminating the agreement and claimed the amount due and outstanding. SK contended that time was not of the essence of the contract and claimed that the termination of the agreement by PFB was in breach of the agreement. The issues before the court were: (i) whether time was of the essence of the contract; and (ii) whether SK was estopped as a result of the earlier proceedings taken by PFB against SK. The suit was over the same contract and it was settled. The High Court dismissed SK's action. SK appealed.

Held, dismissing the appeal:

(1) The indulgence or forbearance on the part of PFB in allowing for late payments of the rentals by SK shall not prejudice or affect PFB's rights by virtue of cl 9(f) of the agreement executed and agreed to by both parties. By virtue of cl 20 of the agreement, PFB rightly terminated the agreement (see p 548C, E).

(2) The issue of the validity of the termination of the agreement could have been raised in the earlier proceedings by PFB though confined to monetary claims only as SK did not raise the legality of the notice of termination as an issue. SK was estopped from denying the validity of the termination of the agreement. The action by SK against PFB was clearly an abuse of the process of the court (see p 550C–D, G).

[Bahasa Malaysia summary

Perayu tersebut ('SK') terlibat di dalam perniagaan kereta terpakai dan memberikan kemudahan-kemudahan kredit. Responden ('PFB'), suatu syarikat kewangan, memberikan kemudahan-kemudahan kredit kepada SK di dalam perniagaannya. Pihak-pihak telah melaksanakan

suatu perjanjian di mana, antara lain, mengenakan kewajipan ke atas SK untuk mengutip dan membayar bagi pihak penyewa-penyewa dan mengirimkan pembayaran-pembayaran tersebut kepada PFB tepat pada masanya pada tarikh-tarikh yang ditentukan. Kemudian PFB mengeluarkan suatu surat bertarikh 25 Julai 1985 kepada SK menamatkan perjanjian tersebut dan menuntut jumlah yang masih perlu dibayar dan belum diselesaikan. SK menegaskan bahawa masa bukanlah penting bagi kontrak tersebut dan menuntut bahawa penamatan perjanjian tersebut oleh PFB adalah bercanggah dengan perjanjian tersebut. Isu-isu di hadapan mahkamah adalah: (i) sama ada masa adalah penting bagi kontrak tersebut; dan (ii) sama ada SK diestop sebagai akibat prosiding-prosiding yang terdahulu yang diambil oleh PFB terhadap SK. Tindakan tersebut adalah berkenaan dengan kontrak yang sama dan ia telah diselesaikan. Mahkamah Tinggi menolak tindakan SK. SK merayu.

Diputuskan, menolak rayuan tersebut:

(1) Kelonggaran atau kesabaran di pihak PFB di dalam membenarkan pembayaran lewat sewa oleh SK tidak akan memprejudis atau menjejaskan hak-hak PFB menurut fasal 9(f) perjanjian tersebut yang dilaksanakan atau dipersetujui oleh kedua-dua pihak. Menurut fasal 20 perjanjian tersebut, PFB dengan betul telah menamatkan perjanjian tersebut (lihat ms 548C, E).

(2) Isu kesahan penamatan perjanjian tersebut boleh dibangkitkan di dalam prosiding-prosiding yang terdahulu oleh PFB walaupun terhad kepada tuntutan kewangan sahaja kerana SK tidak membangkitkan kesahan notis penamatan tersebut sebagai suatu isu. SK diestop daripada menafikan kesahan penamatan perjanjian tersebut. Tindakan oleh SK terhadap PFB adalah jelas penyalahgunaan proses mahkamah (lihat ms 550C–D, G).]

Notes

For cases on termination generally, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3885–3904.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Greenhalgh v Mallard [1947] 2 All ER 255 (refd)

Hicks v Gardner 1 Juv 541 (refd)

Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor [1999] 1 MLJ 193 (refd)

Leeds and Hanley Theatre of Varieties v Broadent [1898] 1 Ch 343 (refd)

OCBC Bank (M) Bhd v Kredin Sdn Bhd [1997] 2 MLJ 544 (refd)

Appeal from: Civil Suit No 22–124 of 1989 (High Court, Seremban)

D Krishna (*Krishna Dallimah & Co*) for the appellant.
Phillip Chai (*Soo Thien Meng & Nashrah*) for the respondent.

Haidar JCA (delivering judgment of the court): In this appeal the appellant, Sing Kee Motor Credit Sdn Bhd ('SK'), as the plaintiff sued the respondent, Public Finance Bhd ('PFB'), as the defendant, in the High Court for breach of contract and for damages. The learned High Court judge after a full trial dismissed SK's action with costs and hence the present appeal by SK before us.

Brief facts

SK is involved in second-hand car business and provides credit facilities whereas PFB, a finance company, provides credit facilities to SK in its business.

Both parties executed an agreement known as 'Hire Purchase Agency Facility' on 6 May 1982 ('the agreement'). Clause 9 (a) of the agreement, inter alia, imposes the obligations of SK as a dealer by way of a guarantee and indemnity to include:

> The dealer undertakes to collect and pay on behalf of hirers and remit *punctually* on specified dates, all sums payable under each and every hire purchase agreement introduced by the dealer. (Emphasis added.)

PFB claimed that SK had on a number of occasions failed to remit the payments punctually resulting in PFB issuing notices of claim and reminders to SK. Following that PFB, through its solicitors, issued a letter dated 25 July 1985 to SK terminating the agreement and claimed a sum of RM43,655 as due and outstanding. However, SK contended that it was willing to pay the claim of PFB on the basis that time was not of the essence of the contract. In that event SK claims that the termination of the agreement by PFB was in breach of the agreement.

Counsel for both parties agreed that there are two issues for determination. They are:

(1) whether time was of the essence of the contract; and

(2) whether the plaintiff was estopped as a result of the earlier proceedings taken by PFB against SK vide Civil Suit No 24–188–86 in the High Court, Seremban. This suit is over the same contract and it was settled.

The learned judge also confined to the above two issues in his judgment.

Issue (1)

The learned judge in considering this issue went on the premise that time was of the essence of the contract. He came to this finding as cl 9(a) of the agreement stipulates that SK is required to make payment of the rentals 'punctually' and cited *Leeds and Hanley Theatre of Varieties v Broadent*

[1898] 1 Ch 343; *Hicks v Gardner* 1 Juv 541 in support thereof. It is not disputed by SK that payments were not made punctually by it to PFB except that it was made to pay interests for the late payments though not provided for by the agreement. However, the payment of interests is not an issue here as it was made without any protest by SK.

In the appeal before us, counsel for SK conceded that time was of the essence of the contract. This would be contrary to the pleaded case of SK as by para 7 of the statement of claim, it is plainly pleaded by SK that time was never of the essence of the contract. It would be too late for SK to change its position before us. With respect, SK should have pleaded that time was of the essence of the contract (as so pleaded by PFB in para 6 of the statement of defence) and to aver that there was waiver on the part of PFB by not taking an early action to terminate the agreement when payments were not made punctually by SK.

In any event, the indulgence or forbearance on the part of PFB in allowing for late payments of the rentals by SK shall not prejudice or affect PFB's rights by virtue of cl 9(f) of the agreement executed and agreed to by both parties. Clause 9(f) reads:

> This guarantee shall be a continuing guarantee and the company's rights hereunder shall not be prejudiced or affected by any indulgence or forbearance on their part extended to the dealer or to any parties the subject hereof or by the death, bankruptcy, liquidation or insolvency of the dealer.

PFB by way of para 4 of the statement of defence averred that it had been constrained to grant forbearance repeatedly until termination of the agreement as a result of the breach.

By virtue of cl 20 of the agreement, PFB rightly terminated the agreement as held by the learned judge. We agree.

Issue (2)

In the present action by SK, the alleged breach of the agreement by PFB is founded on the notice of termination dated 25 July 1985 issued by the solicitors for PFB. It is to be noted that in the earlier Civil Suit No 24–188–86 by PFB against SK, PFB's action is founded on the same notice of termination. In the said suit SK did acknowledge receipt of the said notice but averred that it did not neglect or fail or refuse to pay to PFB the sum of RM48,662.89 or any part thereof. It is to be noted, however, that SK did not at any time respond or dispute to that part of the notice regarding the termination which reads:

> TAKE NOTICE that as a result of your aforesaid breaches our client shall *henceforth* treat the said Master agreement dated 6 May 1982 as terminated and our client shall collect all arrears of and future rentals due directly from the individual hirers. (Emphasis added.)

PFB thereafter proceeded to collect the rentals directly from the hirers.

As SK neglected to pay the sum of RM48,662.89 as per the said notice, PFB filed an action on 18 March 1986 for the recovery only of

RM96,010.64 (inclusive of RM48,662.89) as the sum due on 30 November 1985 vide Civil Suit No 24–188–86 against SK and the three guarantors. As SK did not at any time dispute the termination, PFB obviously confined its action against SK only for the monetary claim, ie the rentals due. Nowhere in its defence to the action by PFB did SK dispute the legality of the termination notice. If it intended to dispute it then SK should have so pleaded in its defence but it merely acknowledged receipt of the termination notice and denied its contents. That was the best opportunity for SK to vindicate its position as to the legality of the termination of the agreement. In the subsequent correspondence between the parties, SK was aware of the termination of the agreement and would appear to have accepted it (see pp 428, 429 and 430 of the appeal record). We reproduce hereunder the relevant correspondence between the parties:

28 August 1986

The Manager
Sing Kee Motor Credit Sdn Bhd
59 1 st Floor Jalan Tuanku Antah
70100 Seremban.

Dear Sir,

Hire Purchase Agency Account (Terminated)

We write to inform you that we have utilised a sum of $23,066.10 from the dealer's commission payable to you (before termination of Master agreement) retained by us, to effect against the following accounts.

...

Yours faithfully
For Public Finance Bhd

sgd
Gan Cheng Huat
Manager

GCH/.. /..

cc The Manager
Public Finance Berhad
Credit Control Department
4th Storey South Block
Wisma Selangor Dredging
Jalan Ampang
50450 Kuala Lumpur

Seng Kee Motor Credit Sdn Bhd

59, 1st Floor, Jalan Tuanku Antah, (Jalan Rahang) 70100 Seremban, NS

Tel: 717318 and 720895

Date: 26 September 1986

Attn: Mr Lee

Public Finance Bhd
No 124 Jalan Dato Bandar Tunggal
70000 Seremban
Negeri Sembilan

Dear Sir,

Re: Hire Purchase Accounts (Terminated)

With reference to your letter dated 28th August 1986, on item (iii) kindly furnish us in detail, as enable us to finalise.

sgd

Finally Civil Suit No 24–188–86 was settled and PFB filed a Notice of Discontinuance and served a copy of it on the solicitors for SK.

For reasons best known to SK, it decided after a lapse of about one and a half years after the settlement of Civil Suit No 24–188–86 to file the present action, the subject matter of the appeal before us on 14 July 1989, alleging that the notice dated 25 July 1985 was in breach of the agreement as time for payment was never of the essence of the contract and thereby claims for damages against PFB. As we have said earlier, the issue of the validity of the termination of the agreement could have been raised in the earlier proceedings, it is now not open to SK to rely on it in the present proceedings. The issue arose out of the same notice in the earlier proceedings by PFB though confined to monetary claims only as SK did not raise the legality of the notice of termination as an issue. This court in *OCBC Bank (M) Bhd v Kredin Sdn Bhd* [1997] 2 MLJ 544 held that the respondent should be shut out from raising in a subsequent action an issue which it could, and should, have raised in earlier proceedings. In this respect, this court in *OCBC*'s case quoted at p 552 with approval what Somervell LJ said in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but .... It covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceedings to be started in respect of them.

The above passage was also quoted with approval by our then Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (see also the Federal Court case of *Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor* [1999] 1 MLJ 193).

By way of paras 9 and 10 of the statement of defence, PFB clearly set out in detail of the settlement of the earlier suit and that SK is estopped from denying the validity of the termination of the agreement.

In our view, the learned judge was correct in holding that the action by SK against PFB is clearly an abuse of the process of the court. When we asked counsel for SK why it took one and a half years for SK to file the present action, he could not offer any explanation, and rightly so, as it clearly denotes SK's futile attempt at trying to get damages from PFB.

In the circumstances, the learned judge was correct in dismissing SK's claim and there were no grounds for us to interfere.

A We dismissed the appeal with costs and ordered the deposit to be paid to PFB, the respondent, towards its taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar

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